

LIBRARY
SUPREME COURT, U.S.

U.S. Supreme Court, U. S.

FILED

SEP 19 1950

CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

299, 314, No. 315 & 324

JOHN F. MCCARTHY (with whom the Federal Reserve
Bank of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor
to the Alien Property Custodian.

**PETITION FOR WRIT OF CERTIORARI TO UNITED
STATES COURT OF APPEALS FOR THE SECOND
CIRCUIT**

HENRY I. FILLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

INDEX

	PAGE
Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit	1
Opinions Below	2
Jurisdiction	2
Statutes and Executive Order Involved	3
Summary Statement of the Matter Involved	3
Specification of Errors	4
Questions Presented	5
Reasons Relied on for the Allowance of the Writ	6
Conclusion	7

CITATIONS

Cases:

<i>Lyon v. Banque Mellie Iran</i> , 339 U. S. 841	6
<i>Lyon v. Singer</i> , 339 U. S. 841	6
<i>Murray Oil Products Co. v. Mitsui & Co., Ltd.</i> , 55 F. Supp. 353, aff'd 146 Fed. [2d] 381	6
<i>Propper v. Clark</i> , 337 U. S. 472	4, 6
<i>United States v. The Antoinetta</i> , 153 Fed. (2d) 138, cert. den. <i>Societa Anonima Cooperative di Navi- gazione Garibaldi v. United States</i> , 329 U. S. 821	6

STATUTES

Joint Resolution of May 7, 1940, 54 Stat. 179	3
Trading with the Enemy Act, as amended (50 U. S. C. Appx.)	3
Section 5(b)	3
Section 7(b)	3

New York Civil Practice Act:

Section 520	3
Section 645	3
Section 916	3
Section 917	3
Section 922	3
Section 948	3
Section 969	3

New York Judiciary Law:

Section 750	3
Section 753	3
Section 773	3

Miscellaneous:

Executive Order No. 8389 (5 F. R. 1400) ..	3
Vesting Order No. 7794	4, 5, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

JOHN F. McCAR~~THY~~² (with whom the Federal Reserve
Bank of New York was impleaded below),

Petitioner,

against

J. HOWARD McGRATH, Attorney General, as Successor
to the Alien Property Custodian.¹

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE
JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John F. McCarthy, respectfully prays
that a writ of certiorari issue to the United States Court
of Appeals for the Second Circuit to review the judgment
of that Court made in the above cause on June 2, 1950.

This petition is a companion to the petition filed simul-
taneously herewith entitled "JOHN F. McCAR~~THY~~ (with
whom The Chase National Bank of the City of New York
was impleaded below), petitioner, vs. J. HOWARD McGRATH,
Attorney General, as successor to the Alien Property Custodian."²

¹ J. Howard McGrath was substituted in the Court of Appeals
for Tom C. Clark, as Attorney General.

² The records in both cases (originals and requisite copies of
which are on file in this Court) are bound together, the Chase
record being designated Part I and the record in the instant case
being designated Part II. In referring to the records "IR" refers
to the record in the Chase case and "IIR" refers to the record of
the instant case. Except as otherwise indicated references are
to folios.

The Attorney General brought this case and the companion case to test the validity of a New York State court attachment issued in a single action instituted by petitioner against Reichsbank, a German bank, and levied upon its accounts with The Chase National Bank of the City of New York and the Federal Reserve Bank of New York. The Attorney General filed two separate proceedings in the District Court, one relating to the accounts with the Chase Bank and the other to the accounts with the Federal Reserve Bank. The banks were parties only to that proceeding which involved the particular accounts maintained with it. Although the cases were presented by separate records and briefs and resulted in separate judgments (IR 307, IIR 247), the District Court and the Court of Appeals decided the two cases by a single opinion. The banks did not appeal from the District Court judgment.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 82 F. Supp. 740, and may be found on page 97 of the record in the Chase Bank case (IR p. 97). The *per curiam* opinion of the Court of Appeals for the Second Circuit is reported at 182 F. (2d) 349, and may be found at page 99 of the record of the instant case (IIR p. 99).

Jurisdiction

The date of the judgment to be reviewed is June 2, 1950. A petition for rehearing was filed on June 16, 1950 and denied on June 27, 1950.

The jurisdiction of this Court to issue the writ of certiorari applied for is predicated upon Title 28 of the United States Code, Section 1254.

Statutes and Executive Order Involved

The pertinent statutes are the Trading with the Enemy Act, approved October 6, 1917, as amended, particularly Sections 5(b) and 7(b), the Joint Resolution of May 7, 1940, amending Section 5(b) of the Trading With the Enemy Act and approving Executive Order No. 8389; The New York Civil Practice Act, Sections 520, 645, 916, 917, 922, 948 and 969, and The New York Judiciary Law, Sections 750, 753 and 773.

The Executive Order involved is Executive Order No. 8389 as amended.

The relevant provisions of the statutes and Executive Order are collected in the Appendix annexed to the brief attached to the petition for certiorari in the companion Chase Bank case, to which the Court is respectfully referred.

Summary Statement of the Matter Involved

This case involves the same New York Supreme Court attachment involved in the companion Chase case, but which was levied on the Reichsbank accounts with Federal Reserve Bank of New York (IIR 19) on January 21, 1942. Since the facts of the two cases are essentially the same, we respectfully refer this Court to the statement made in our petitioner for certiorari in the Chase case in order to avoid duplication and unnecessary repetition. However, this case is unlike the Chase case in that here the Custodian, by Vesting Order No. 7794 of October 3, 1946, and a Turnover-Directive issued on October 14, 1946, addressed to the Federal Reserve Bank of New York (IIR 21-22), vested the entire *corpus* represented by the Reichsbank account with the Federal Reserve Bank, whereas in the companion Chase case the Custodian vested the "right, title and interest" of Reichsbank in the accounts with the

Chase and committed to judicial determination the *quantum* of the property acquired.

Furthermore, here the Attorney General sought a declaration that, by virtue of the Vesting Order and the Turnover Directive, he is entitled to possession of the Reichsbank accounts with the Federal Reserve Bank, notwithstanding petitioner's attachment, whereas in the Chase case he sought a declaration that he was not only entitled to the Reichsbank accounts with the Chase by virtue of the Vesting Order in that case, but, also, that petitioner and the Sheriff of the City of New York obtained no lien or other interest in those accounts. The two cases were treated by the District Court and the Court of Appeals as involving the same questions.

Specification of Errors

The United States Court of Appeals erred:

First. In deciding that petitioner's attachment was forbidden by Executive Order No. 8389, as amended, and therefore, invalid.

Second. In refusing to hold that petitioner's attachment was authorized by the Secretary of the Treasury and, therefore, valid.

Third. In refusing to hold that the lien of petitioner's attachment was not affected by the claimed seizure of the accounts of Reichsbank with the Federal Reserve Bank of New York by Vesting Order No. 7794 and the Turnover Directive of October 14, 1946.

Fourth. In deciding that this case is controlled by *Prop- per v. Clark*, 337 U. S. 472.

Fifth. In refusing to hold that the District Court should have given full faith and credit to petitioner's attachment and should have declined to entertain this cause.

Sixth. In affirming the decree of the District Court and refusing to reverse such decree and direct dismissal of the Attorney General's petition, or at least modifying the decree in so far as it relates to the Federal Reserve case by providing that the claimed seizure by Vesting Order No. 7794 and the Turnover-Directive was subject to the lien of petitioner's attachment.

Questions Presented

The questions presented are:

First. Whether the commencement of petitioner's suit against Reichsbank in the New York Court and the levy of the warrant of attachment issued therein for jurisdictional purposes upon the blocked accounts of Reichsbank with the Federal Reserve were forbidden by Executive Order No. 8389, as amended.

Second. Assuming, but without conceding, that by the words of Executive Order No. 8389, as amended, the commencement of suits by attachment of blocked assets was forbidden "unless authorized by the Secretary of the Treasury by means of regulations, rules, instructions, licenses, or otherwise" (the Order, Section 1), whether the attachment for jurisdictional purposes of Reichsbank's blocked accounts with the Federal Reserve in aid of the New York action by petitioner, an American citizen, against Reichsbank, a non-resident blocked national, was authorized by the Secretary of the Treasury in view of the Attorney General's concession in this case that "the bringing of an action, the issuance of a warrant of attachment therein, and the levy thereunder upon blocked property within the jurisdiction of the court which issued the warrant were not forbidden but that a license was required to be secured before payment could be made from the blocked account to satisfy any judgment recovered in such action." (HR 226).

Third. Whether the claimed seizure of the Reichsbank's accounts with the Federal Reserve by Vesting Order No. 7794 and the Turnover-Directive was subject to the lien of petitioner's attachment.

Fourth. Whether this case is controlled by *Lyon v. Singer* and *Lyon v. Banque Mellie Iran*, 339 U. S. 841, decided June 5, 1950, or by *Propper v. Clark*, 337 U. S. 472.

Fifth. Whether the District Court was required to give full faith and credit to petitioner's New York attachment and to decline to entertain this cause.

Reasons Relied on for the Allowance of the Writ

The reasons for the allowance of the writ of certiorari applied for in this case are the same as those relied on for the allowance of the writ of certiorari applied for in the companion Chase case, particularly in that the decision below conflicts with *Murray Oil Products Co. v. Mitsui & Co., Ltd.*, 55 F. Supp. 353, affirmed 146 Fed. [2d] 381. To avoid duplication the Court is respectfully referred to the petition in that case and the brief annexed thereto.

An additional reason for the allowance of the writ in this case is that the decision of the court below conflicts with the decision of the Circuit Court of Appeals, Third Circuit, in *United States v. The Antoinetta*, 153 Fed. (2d) 138, certiorari denied, *Societa Anonima Cooperative di Navigazione Garibaldi v. United States*, 329 U. S. 821.

There, the Custodian seized a cargo of oil on the "Brennero," an Italian vessel, as well as the vessel itself. Counsel for the claimants asserted a proctor's lien against the proceeds of sale of the oil, deposited in the court registry, in support of his claim for compensation for his services. The Court of Appeals, Third Circuit, held, at page 143:

"The Custodian, however, seized the cargo as well as the ship. The seizure vested title to the oil in the

Custodian. If the proctor had a valid lien prior to the seizure, the lien would not be affected by the seizure."

So, here too, the lien of petitioner's attachment levied on the Reichsbank accounts with the Federal Reserve Bank was not affected by the claimed seizure of the accounts by the Custodian.

Conclusion

Wherefore, your petitioner prays for the allowance of a writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause, there entitled "J. HOWARD McGRATH, Attorney General, as successor to the Alien Property Custodian, Petitioner-Appellee v. FEDERAL RESERVE BANK OF NEW YORK and JOHN J. McCLCSKEY, JR., as Sheriff of the City of New York, and LEO ZITTMAN and JOHN F. MCCARTHY, Respondents-Appellants", that said cause may be reviewed and determined by this Court, and that the judgment of the said United States Court of Appeals may be reversed and set aside; and for such other and further relief and remedy in the premises as this Court may deem meet and proper.

JOHN F. MCCARTHY,
Petitioner.

By HENRY I. FILLMAN,
Counsel for Petitioner,
120 Broadway,
New York 5, N. Y.

HENRY I. FILLMAN,
OTTO C. SOMMERICH,
of Counsel.
September 12, 1950.